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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CARLISS RICHARDSON-MCGHEE et al.,

Plaintiffs and Respondents,

v.

ROBERT MITCHELL et al.,

Defendants and Appellants.

B162441

(Los Angeles County Super. Ct.
No. BC238288)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Morris B. Jones, Judge. Affirmed.

Straw & Gough, Paul T. Gough; and Walter L. Gordon, III, for Defendants and Appellants.

Marcus, Watanabe, Snyder & Dave and Wendy Y. Watanabe for Plaintiffs and Respondents.

In this real property action, defendant and appellant Robert Mitchell appeals from a judgment ordering specific performance of a contract to sell real property to plaintiffs and respondents Carliss Richardson-McGhee and Perfisity McGhee (collectively the McGhees). Mitchell contends substantial evidence does not support the judgment, ethical violations rendered the sale agreement void, and the action is barred by the statute of limitations and laches. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On April 5, 1995, Mitchell¹ and the McGhees entered into a Residential Lease with Purchase Option (“Lease/Option Agreement”). The Lease/Option Agreement provided the McGhees would lease Mitchell’s property for 12 months at a monthly rent of \$3,375. The Lease/Option Agreement also contained an option to purchase the property that included the following terms: (1) the sale price would be the appraised value of the property; (2) the sale price would be reduced by the total rent paid by the McGhees; (3) the purchase option would begin April 9, 1995, and end at 11:59 p.m. on April 8, 1996, with a right of renewal for an additional six months; (4) the option would be exercised by delivery of a copy of the notice of exercise and signed escrow instructions to the named escrow holder; and (5) if the option were not exercised in the manner specified within the option period or any written extension period, the option and all rights to purchase the property would terminate and all rent that had been paid would be retained by Mitchell. The McGhees paid \$5,000 for the option.

Later in April 1995, Mitchell showed the McGhees a recent appraisal of the property for \$425,000. The McGhees agreed to \$425,000 as the purchase price.

¹ Mitchell was also known as Bob Tieger. Respondent’s Brief refers to Mitchell as Tieger.

On April 4, 1996, the McGhees and Mitchell entered into a Contract Supplement/Addendum, which extended the term of the option to October 8, 1996, at 11:59 p.m.

On October 8, 1996, the McGhees exercised the option, by executing a notice of exercise of option and escrow instructions, and delivering the notice, escrow instructions, and a check for \$1,000 to the escrow company and the notice and escrow instructions to Mitchell. The McGhees attempted to reach an understanding with Mitchell concerning the amount of the rent credit toward the purchase price, but Mitchell evaded the issue and the matter remained unresolved.

In 1999, the McGhees acceded to a request by Mitchell to obtain a new appraisal. When the new appraisal was received for \$535,000, the McGhees and Mitchell agreed to a sale price of \$500,000. Pursuant to the McGhees' exercise of the option to purchase, the McGhees and Mitchell entered into a Residential Purchase Agreement on July 2, 1999. The Residential Purchase Agreement did not include a provision concerning the rent credit toward the \$500,000 purchase price, but stated the purchase was pursuant to the Lease/Option Agreement as extended by the Contract Supplement/Addendum.² The Residential Purchase Agreement provided that escrow would close by December 31, 1999.

However, Mitchell continued to delay. He refused to acknowledge the McGhees were entitled to a rent credit. In a December 17, 1999 letter to Mitchell, the McGhees itemized the rent payments that had been made between April 1995 and December 1999, and stated the McGhees were entitled to a rent credit toward the sale price in that amount. On January 26, 2000, Mitchell asked the McGhees for a copy of the provision of the Lease/Option Agreement governing the rent credit. The McGhees supplied the document, but Mitchell continued to fail to commit to a specific rent credit.

² On appeal, Mitchell suggests we should view the Lease/Option Agreement and Residential Purchase Agreement as separate agreements. However, in our view, both documents are part of a single purchase and sale agreement: the Lease/Option Agreement contained an option to purchase, the McGhees exercised the option, and the parties then entered into the Residential Purchase Agreement to effect the sale.

On April 17, 2001, a first amended complaint (the “complaint”)³ was filed for damages for deceit, imposition of a constructive trust, specific performance, breach of contract, declaratory relief and injunctive relief. The McGhees sought specific performance of the agreement to sell them the property, with credit for the rent payments.

The case was tried to the court on September 25, 2002. On September 27, 2002, the trial court ruled in favor of the McGhees on the causes of action for specific performance and breach of contract. The trial court ordered Mitchell to sell the property to the McGhees for \$500,000 and awarded the McGhees \$187,577.50, as the amount of the rent credit.⁴ This timely appeal followed.

DISCUSSION

I. Sufficiency of the Evidence⁵

A. Conditions Precedent

Mitchell contends substantial evidence does not support the order of specific performance, because the McGhees failed to prove they were ready, willing and able to finance the purchase. (See *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 890.) This contention is belied by the record. Carliss Richardson-McGhee testified she had secured a commitment from a lending institution approving a \$500,000 loan for the purchase of the property. This is substantial evidence the McGhees were ready, willing and able to finance the purchase.

³ A complaint for breach of contract, specific performance and fraud had been filed on October 10, 2000.

⁴ Mitchell raises no issue concerning the amount of the rent credit.

⁵ Mitchell attempts to characterize the issues as questions of law. They are, however, questions of substantial evidence.

Mitchell further contends substantial evidence does not support the order of specific performance because the McGhees did not open an escrow by December 31, 1999, as required by the Residential Purchase Agreement, or tender the purchase price. We disagree with the contention.

“ ‘[T]o entitle a party to specific performance, he must have (a) performed, (b) offered to have performed, or (c) proved a sufficient excuse for not performing, all the conditions required of him’ by the agreement. [Citations.] However, where a vendor repudiates a contract and indicates that he is not bound thereby, a tender is unnecessary.” (*Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769, 777; see Civ. Code, § 1440 [repudiation of the contract by one party permits the other party to enforce the contract without previously performing the conditions on his part].) A seller’s refusal to take any action toward completion of the sale is a repudiation of the sale agreement excusing further performance by the buyer. (*Beverage v. Canton Placer Mining Co.*, *supra*, 43 Cal.2d at p. 777; accord, *Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 Cal.App.4th 641, 646.) “Repudiation is a question of fact to be determined from the evidence.” (*Singh v. Burkhardt* (1963) 218 Cal.App.2d 285, 293.)

We conclude substantial evidence supports a finding Mitchell had repudiated the contract by refusing to carry out the agreement to credit the rent paid to the purchase price of \$500,000. There was testimony that Mitchell refused to acknowledge that the agreement entitled the McGhees to a rent credit on the purchase price and cooperate in fixing an amount for the credit. There was evidence McGhee advised Mitchell on December 17, 1999, concerning the amount of the credit to which the McGhees were entitled, but Mitchell did not respond before the December 31, 1999 deadline for the close of escrow. Mitchell did not cooperate subsequently. This is sufficient evidence Mitchell repudiated the agreement. Evidence of the repudiation supports the order of specific performance, because the repudiation excused performance of the McGhees’ obligation to tender the purchase price and the condition that escrow close by December 31, 1999.

B. Exercise of the Option to Purchase

Mitchell contends substantial evidence does not support the conclusion that the McGhees validly exercised the option to purchase the property, in that the McGhees repudiated the Lease/Option Agreement by placing new and different terms into the October 1996 escrow instructions. Accordingly, Mitchell argues the McGhees' right under the Lease/Option Agreement to a credit for the rent paid was extinguished. We disagree.

Apart from whether the October 1996 escrow instructions contained new or different terms, we conclude the McGhees' right to a credit was not extinguished, because the Residential Purchase Agreement, which Mitchell executed, incorporated the terms of the Lease/Option Agreement, including the right to a credit toward the purchase price. Therefore, Mitchell was bound by the rent credit provision.

II. Contractual Terms

Since the facts concerning the execution and language of the agreement are not in dispute, construction of the agreement is a question of law for our de novo review. (*Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 546.)

The essential terms of a contract for the sale of real property are the seller, buyer, price to be paid, time and manner of payment, and property to be transferred. (*Doryon v. Salant* (1977) 75 Cal.App.3d 706, 711.) If those terms can be ascertained from the written agreement, the agreement is specifically enforceable. (*Ibid.*) “[I]f no time is specified for the performance of an act required to be performed, a reasonable time is allowed.” (Civ. Code, § 1657.)

Mitchell contends the agreement is too uncertain to be enforced. We disagree. The agreement identifies the buyer, seller, property and price. Further, the agreement describes the time and manner of payment, in that it provides the McGhees are to find proper financing or assume Mitchell's loan and cash Mitchell out, act diligently to obtain the

designated loans, and deposit the balance of the purchase price with the escrow holder in sufficient time to close escrow on or before December 31, 1999. Thus, the written agreement contains all the essential terms necessary for specific performance.

Mitchell argues other terms essential to the agreement are missing: the rent credit and time periods concerning reports, disapprovals and contingencies. We disagree. The credit provision is found in the Lease/Option Agreement, which was incorporated in the Residential Purchase Agreement. To the extent time periods for performance are missing, Civil Code section 1657 provides for a reasonable time. Accordingly, the agreement is not too uncertain to be enforceable.

III. Ethical Violation

Perfistry McGhee is an attorney. After the Lease/Option Agreement was entered into, Perfistry McGhee represented Mitchell in some unrelated legal matters. Mitchell contends the trial court erred in failing to void the Residential Purchase Agreement on the ground Perfistry McGhee violated the California Rules of Professional Conduct. Mitchell contends Perfistry McGhee was Mitchell's attorney in other matters, but had failed to comply with the requirements of the California Rules of Professional Conduct, rule 3-300 before entering into this transaction.⁶ We conclude the issue has been waived. Mitchell did not allege in his answer or assert at trial that the agreement was void on the ground Perfistry McGhee had violated an ethical duty. Mitchell did not ask the trial court to declare the agreement void.⁷ Mitchell did not present evidence concerning Perfistry McGhee's failure

⁶ California Rules of Professional Conduct, rule 3-300 provides, inter alia, that an attorney may not enter into a business transaction with a client without first advising the client that the client may seek the advice of an independent lawyer.

⁷ Mitchell objected at trial that the McGhees' examination of Mitchell concerning Mitchell's bankruptcy filings was improper because Perfistry McGhee had been Mitchell's attorney and thus had been privy to confidential attorney/client information. (RT 54)~

to comply with the Rules of Professional Conduct. Therefore, the issue has been waived. (*In re Katrina W.* (1994) 31 Cal.App.4th 441, 448.)

IV. Statute of Limitations and Laches

Mitchell contends the statute of limitations and doctrine of laches bar the action for recovery of the rent credit under the Lease/Option Agreement. We disagree with the contention. Mitchell does not contend that action on the Residential Purchase Agreement is time-barred. The Lease/Option Agreement was incorporated in the Residential Purchase Agreement. Thus, the rent credit provision is a term of the Residential Purchase Agreement. Action on the Residential Purchase Agreement is timely.

Even if the Lease/Option Agreement were a separate agreement, Mitchell waived the defense of statute of limitations by failing to plead the defense in the answer to the complaint. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581.) Moreover, substantial evidence supports a finding laches does not bar specific performance. The affirmative defense of laches requires an unreasonable delay in bringing suit and either acquiescence by the plaintiff in the act complained of or prejudice to the defendant resulting from the delay. (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 241.) The defendant must affirmatively demonstrate prejudice. (*Ibid.*) First, it is not clear when Mitchell finally refused to agree to the rent credit. Second, there was evidence that, after the timely exercise of the option, the McGhees repeatedly asserted their right to a rent credit, spoke with Mitchell concerning the rent credit, agreed to renegotiate the purchase price, and sought to enlist Mitchell's cooperation in completing the purchase. Moreover, there was evidence Mitchell gave assurances to the McGhees that the rent credit issue would be resolved, offered to allow the McGhees to assume Mitchell's existing loan on the property, and requested information in

However, Mitchell did not proffer the relevance of such evidence and did not request to void the agreement; the proffered evidence was not introduced.

2000 concerning the rent credit agreement. This was substantial evidence the delay in bringing suit was not unreasonable and the McGhees did not acquiesce in Mitchell's refusal to agree to a rent credit. Moreover, Mitchell did not present evidence the property had increased in value after the price of \$500,000 had been agreed upon in 1999. Thus, there was no evidence of prejudice. Accordingly, substantial evidence supports the conclusion that laches does not bar specific performance of the agreement.

DISPOSITION

The judgment is affirmed. Appellant is to pay costs to respondents.
NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.